

DOCUMENT DISCERN

02069 - [A1172151]

[Protest against Procuring Activity's Refusal to Permit Offeror to Reduce Price Is Untimely]. B-107145. April 30, 1977. 3 pp.

Decision re: Delta Data Systems Corp.; by Paul G. Deabling, General Counsel.

Issue Area: Federal Procurement of Goods and Services (1900).

Contact: Office of the General Counsel: Procurement Law I.

Budget Function: General Government; Other General Government (806).

Organization Concerned: General Services Administration; United States Customs Service; Beehive Medical Electronics, Inc.

Authority: 4 C.F.R. 20.2.

The award of a contract for cathode ray terminals to Beehive Medical Electronics, Inc., was protested because of a refusal to permit the offeror to reduce the price after the date set for final offers. The protest was untimely and not for consideration on the merits. (HRS)

02069

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

nt
Proc I

FILE: B-187145

DATE: April 20, 1977

MATTER OF: Delta Data Systems Corporation

DIGEST:

Protest against procuring activity's refusal to permit offeror to reduce price after date set for best and final offers is untimely and not for consideration on merits where record discloses that protest was filed more than 10 days after basis for protest was or should have been known.

Delta Data Systems Corporation (Delta) protests the award of a contract to Beehive Medical Electronics, Inc. (Beehive), under request for proposals (RFP) No. CDPA-75-11 issued by the General Services Administration (GSA), Washington, D.C. The RFP called for cathode ray tube terminals and associated printers to be installed at various international airports for use by the U.S. Customs Service in its Treasury Enforcement Communications System.

The RFP at paragraph 1-7 contained a late proposals clause which advised offerors that any proposal received after the exact time specified would not be considered for award. The initial closing date for receipt of proposals, August 15, 1975, was extended to September 2, 1975.

The record discloses that of the 13 proposals submitted, nine offerors, including Delta, remained within the competitive range as of February 23, 1976, the final extended closing date set by the contracting officer for the submission of best and final offers. GSA reports that after the February closing date the evaluation of best and final offers was extremely time consuming and necessitated a request that offerors extend their offers. On April 19, 1976, Delta extended its offer to June 11, 1976.

GSA reports that as of June 25, 1976, six firms, including Delta, remained in the competition. A third request for extension of offers was issued by the contracting officer on June 30, 1976, and Delta extended its offer to July 16, 1976. On July 9, 1976, Beehive, the low offeror, was awarded contract No. GS-00C-50215.

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By letter dated August 6, 1976, Delta filed its protest with our Office and GSA against the award to Beehive. GSA in its initial report to our Office maintains that Delta's protest is untimely under our Bid Protest Procedures, 4 C.F.R. § 20.2 (1976). Section 20.2(b)(2) requires that bid protests be filed not later than 10 days after the basis for the protest is known or should have been known, whichever is earlier. GSA advises that in mid-May 1976, a representative of Delta contacted the contracting officer to explore the possibility of permitting Delta to reduce its prices. No written offer to change its price was submitted by Delta at that time. GSA states that the contracting officer advised Delta that negotiations were closed as of February 23, 1976, and that Delta could not change its best and final offer. This is acknowledged by Delta in its August 6 letter. GSA points out that Delta acknowledged in its June 11, 1976, letter to the contracting officer that "[W]e [Delta Data] were informed that, due to the bidding process, we could not change our pricing." GSA observes that Delta waited until after award to file its protest, although it was aware in mid-May 1976 that its firm would not be permitted to change its best and final offer. Accordingly, GSA contends that the protest should be dismissed as untimely.

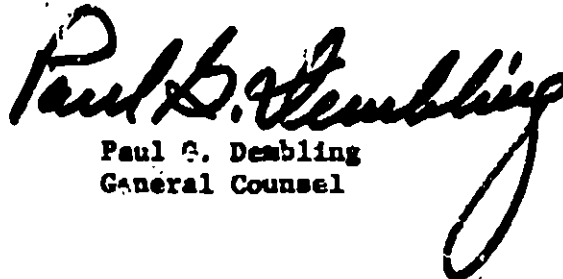
Following receipt of GSA's initial report to our Office, counsel for Delta furnished us with its comments setting forth the reasons for its position that we should consider the protest on the merits. Counsel contends that Delta was not required to file a protest until it was notified that it had not been awarded a contract. Counsel states that prior to filing its protest, representatives of Delta had extensive discussions with GSA after notification of the award to Beehive. Counsel further states that in the course of these discussions Delta asked whether it would be given an opportunity to review Beehive's proposal and was advised that a protest could be filed within a reasonable time after it had an opportunity to review Beehive's proposal. After filing its August 6 protest, Delta received a letter dated August 23, 1976, from GSA which, in effect, denied Delta's protest. Counsel for Delta states that the reasons given for the denial were that the offered price reduction was a late modification which could not be accepted, the needs of the U.S. Customs office were critical, and further delay would result in increased expenditures for leased equipment. No mention was made regarding the possible untimeliness of the protest. On September 3, 1976, counsel wrote GSA and asked whether its August 23 letter was a rejection of Delta's protest and also requested a statement of GSA's position in this matter since Delta intended to appeal any rejection of its protest. By letter dated September 20, 1976, GSA advised counsel for Delta that its August 23 letter to Delta was a rejection of the protest. In view of these circumstances, counsel for Delta contends that it is inappropriate for GSA to contend that Delta's protest is untimely.

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Concerning the appropriateness of GSA's contention that the protest is untimely, we are of the view that such procedural matters may be raised at any time by a party of interest. In any event, GSA's oral advice concerning when a protest may be filed would in no way affect our consideration of the issue of timeliness in a protest before our Office.

We do not agree with the thorough arguments of Delta's counsel that Delta was not required to file its protest prior to award. The record indicates that the basis for Delta's protest was the refusal of the procuring activity to permit its firm to reduce its price after the February 23, 1976, closing date for receipt of best and final offers, and was not based upon any matter made known to it after award. This fact was known to Delta in mid-May 1976, and therefore any protest on this basis was required to be filed within 10 working days thereafter. Failure to file the protest prior to its August 6, 1976, letter renders the protest untimely.

Accordingly, the protest will not be considered upon its merits.


Paul G. Desbling
General Counsel